

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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OSCAR GARNER,

Plaintiff,

v.

JEFFREY JOPP,

Defendant.

OPINION AND ORDER

11-cv-719-slc

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In this civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Oscar Garner, a prisoner at the Waupun Correctional Institution, has been granted leave to proceed on his claim that defendant Jeffrey Jopp, an officer at the institution, violated his rights under the Eighth Amendment by failing to provide him adequate medical treatment for an asthma attack on May 30, 2011. Garner has filed a verified complaint in which he swears that he had an asthma attack, that he told Jopp that he needed to see a nurse for his asthma and that Jopp ignored him. Dkt. 1.

Before the court is Jopp's motion for summary judgment. Dkt. 22. (Although Garner also filed a document styled as a motion for summary judgment, dkt. 27, I infer from the motion's untimely filing and supporting papers that Garner simply mis-labeled his opposition to Jopp's motion as his own motion for summary judgment. Even if it was a timely motion, however, I would deny it for the same reasons I am denying Jopp's motion.) Jopp does not dispute that Garner was diagnosed with asthma or that an asthma attack is a serious medical need, but he denies that Garner ever told him that he was having an asthma attack on May 30, 2011 or that he saw anything to indicate that Garner was having such an attack that day. In the alternative, Jopp contends that he is entitled to qualified immunity. In response, Garner

stands by the sworn statements in his complaint. *Ford v. Wilson*, 90 F.3d 245, 247 (7th Cir. 1996) (complaints made under penalty of perjury have the force of affidavits).

Summary judgment is appropriate if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Jopp has not made this showing. A genuine dispute exists as to whether Garner had an asthma attack on May 30, 2011 and whether he reported the attack to Jopp. These facts are material. As this court noted in the order to show cause, asthma “can be, and frequently is, a serious medical condition, depending on the severity of the attacks.” *Board v. Farnham*, 394 F.3d 469, 484 (7th Cir. 2005); *see also Garvin v. Armstrong*, 236 F.3d 896, 898 (7th Cir. 2001) (“Asthma, depending upon its degree, can be a serious medical condition.”). If the jury accepts Garner’s version of the facts, then it could reasonably find that Jopp demonstrated deliberate indifference by failing to call a nurse or otherwise take action in response to Garner’s reports of an asthma attack.

Jopp suggests that no reasonable jury could believe Garner’s testimony in light of other evidence in the record that suggests that Garner did not have an asthma attack on May 30, 2011. Def.’s Br. in Supp., dkt. 23, at 5-6. As Jopp’s counsel is no doubt aware, however, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Neither the peak flow readings taken by the prison nurse on June 1, 2011, nor Garner’s failure to tell the nurse about his asthma attack two days earlier establishes that Garner’s account is physically impossible or otherwise proves fabrication. It will be up to the jury to assess this evidence and determine whether Garner’s account is believable.

Finally, Jopp is not entitled to summary judgment on grounds of qualified immunity. “[T]he right to receive adequate treatment for serious medical needs is a clearly established constitutional right,” *Board*, 394 F.3d at 485, and as noted above, courts have recognized that asthma can be a serious medical need. Clearly, Jopp was or should have been “on notice” that refusing to call a nurse or take any other action in response to an asthma patient’s complaints of breathing problems could constitute a deprivation of an inmate’s constitutional rights. *Accord Board*, 394 F.3d at 485 (affirming district court’s denial of qualified immunity to prison officers who allegedly failed to provide inhaler to asthma patient who was complaining of severe breathing problems).

For these reasons, Jopp’s motion for summary judgment must be denied.

ORDER

IT IS ORDERED that:

1. Defendant Jeffrey Jopp’s motion for summary judgment, dkt. 22, is DENIED.
2. Plaintiff Oscar Garner’s motion for summary judgment, dkt. 27, is DENIED.

Entered this 16<sup>th</sup> day of January, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge